Supreme Court, U.S.
FILED

NO. 04 579

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In The Supreme Court of the United States

WAYNE CHARLES OKEN,

Petitioner,

v.

THE MONSANTO COMPANY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Which, if any, state law personal injury claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136–136y?

LIST OF PARTIES TO THE PROCEEDING

WAYNE CHARLES OKEN,

Appellant,

v.

THE MONSANTO COMPANY, THE SOLARIS GROUP, SCOTTS COMPANY, DOW AGROSCIENCES LLC, DOWELANCO, THE DOW CHEMICAL COMPANY, EPCO, INC., ROFAN SERVICES INC., HOME DEPOT U.S.A., INC., THE A.B.C. COMPANY, ET AL.,

Appellees.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 5

I. Introduction 6

II. This Court Should Grant Review to Resolve the Conflict Among the Lower Courts Regarding Whether FIFRA Preempts Certain Design Defect Claims 10

A. The Eleventh Circuit's Forbidden Inquiry Test 10

B. Consumer Expectations-Based Claims Under the Manufacturer's Choice Test 14

III. This Court Should Grant Review to Resolve the Conflict Between the Eleventh Circuit's Forbidden Inquiry Test and This Court's Prior Precedent on FIFRA 15

IV. This Court Should, In the Alternative, Grant Review Pending the Resolution of Bates, Vacate the Judgment of the Court of Appeals, and Remand for Further Consideration 16

CONCLUSION 17

APPENDIX

TABLE OF AUTHORITIES

Page(s)

CASES

Andrus v. AgrEvo USA Co.,
178 F.3d 395 (5th Cir. 1999) 7-8

Arnold v. Dow Chemical Co.,
110 Ca. Rptr. 2d 722 (Cal. Ct. App. 2001) 14

Bates v. Dow AgroSciences LLC,
332 F.3d 323 (5th Cir. 2003), *cert. granted*,
124 S. Ct. 2903 (2004) ..... *passim*

Chemical Specialties Mfrs. Ass'n v. Allenby,
958 F.2d 941 (9th Cir. 1992) 8

Cipollone v. Ligget Group, Inc.,
505 U.S. 504 (1992) 10, 11

Ferebee v. Chevron Chemical Co.,
736 F.2d 1529 (D.C. Cir. 1984) 9, 10

Lescs v. William R. Hughes, Inc.,
168 F.3d 482,
1999 WL 12913 (4th Cir. 1999), *cert. denied*,
528 U.S. 1119 (2000) 14, 15

Netland v. Hess & Clark, Inc.,
284 F.3d 895 (8th Cir. 2002) 7

Oken v. Monsanto Co.,
218 F. Supp. 2d 1361 (S.D. Fla. 2002) 12

Oken v. Monsanto Co.,
371 F.3d 1312 (11th Cir. 2004) 13

Papas v. Upjohn Co., cert. denied sub nom,
985 F.2d 516 (11th Cir. 1993)
Papas v. Zoecon Corp.,
510 U.S. 913 (1993) 7, 10, 11, 12

Pitts v. Dow Chemical Co.,
859 F. Supp. 543 (M.D. Ala. 1994) 9, 11

Sleath v. W. Mont Home Health Servs., Inc.,
16 P.3d 1042 (Mont. 2000), *cert. denied sub nom,*
Dow AgroSciences LLC v. Sleath,
534 U.S. 814 (2001) 10, 11

Wisconsin Public Intervenor v. Mortier,
501 U.S. 597 (1991) 8, 16

Worm v. American Cyanamid Co.,
5 F. 3d 744 (4th Cir. 1993) *7*

STATUTES

7 U.S.C. §§ 136–136y ..... *passim*

7 U.S.C. § 136v 1, 11

7 U.S.C. § 136v(a) 8, 9, 15, 16

7 U.S.C. § 136v(b) ..... *passim*

28 U.S.C. § 1254(1) 1

Petitioner respectfully requests that this Court grant his writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The district court's opinion granting the motion for summary judgment of respondents Dow AgroSciences LLC, The Dow Chemical Company, Rofan Services, Inc., and Epco, Inc. (collectively, "the Dow defendants") is published at 218 F. Supp. 2d 1361. The opinion of the court of appeals affirming the district court's grant of summary judgment for all respondents is published at 371 F.3d 1312.

STATEMENT OF JURISDICTION

The court of appeals entered its order and opinion on June 4, 2004. The court of appeals entered its order denying Petitioner's petition for rehearing on August 2, 2004. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

7 U.S.C. § 136v provides:

Authority of States

(a) **In general.** A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent that it does not permit any sale or use prohibited by this subchapter.

(b) **Uniformity**. Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

(c) **Additional uses**. (1) A State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator.

STATEMENT OF THE CASE

Petitioner, Wayne Charles Oken, purchased two bags of Ortho Dursban Lawn & Garden Insect Control from Respondent Home Depot U.S.A., Inc. ("Home Depot"). Petitioner, a homeowner, read the label and applied the two bags to his lawn using a two-wheeled spreader. As he spread the lawn and garden pesticide, a mist of powder arose and clung to his skin. Shortly thereafter, petitioner began to experience the signs and symptoms of acute cholinergic poisoning. He required immediate hospitalization, where he had to be intubated to assist his breathing, and has suffered severe neurological problems since.

Ortho Dursban Lawn & Garden Insect Control, as the name suggests, was a product intended and marketed for use by homeowners and sold in retail outlets such as Home Depot. "Dursban" is a trademark of Respondent Dow AgroSciences LLC ("Dow"), and Dow supplied the product's active ingredient. Respondent The Monsanto

Company ("Monsanto") took the active ingredient that Dow supplied (actually Dow supplied a product called "Dursban HF," which contains some inactive ingredients as well), applied it to an inert carrier (such as peanut hulls or corn grit), and packaged it for sale. In industry parlance, Dow is known as the "basic manufacturer" and Monsanto is known as the "formulator." Dow and Monsanto were both integral participants in the design and marketing of Ortho Dursban Lawn & Garden Insect Control.

Petitioner filed suit against Home Depot, an unknown distributor ("A.B.C. Company") and numerous entities related to Dow and Monsanto in the Circuit Court of the 17th Judicial Circuit, Broward County, Florida on April 12, 2001 to recover damages for his personal injuries. The complaint stated strict products liability claims against each of the defendants for selling an unreasonably dangerous product with manufacturing, design, and warning defects. It also stated negligence claims against each defendant for failure to stop the sale of Ortho Dursban Lawn & Garden Insect Control. The complaint stated additional negligence claims against the Dow and Monsanto defendants arising out of their manufacture and design of the product.

The case was removed to federal district court in Ft. Lauderdale, Florida on August 15, 2001. Following removal, while discovery was ongoing, the Dow defendants filed a motion for summary judgment averring that Petitioner lacked evidence to support his allegations of manufacturing defect and negligent manufacturing, and that the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. 136–136y ("FIFRA") preempted the remainder of his claims. Petitioner responded that FIFRA does not preempt any common law claims. He also emphasized that, even if FIFRA does preempt those claims premised on failure to warn, at least his allegation that the active ingredient in Ortho Dursban Lawn & Garden Insect Control

is too dangerous for use by nonprofessionals or around residences is an attack on the product's design rather than its label, as it would make no sense to label a do-it-yourself lawn and garden pesticide as "not for use by homeowners."

The district court granted the Dow defendants' summary judgment motion as to the manufacturing claims for lack of evidence, and granted the Dow defendants' motions as to the remaining claims on the basis of FIFRA preemption. In holding that Petitioner's design defect claims under Florida law were preempted by FIFRA, the district court focused on what Florida law would require a jury to consider rather than the specific restrictions on product sales and uses that Petitioner sought to enforce through his damages action. The court held that the two tests for design defectiveness under Florida law, the risk-utility test and the consumer expectations test, both require the jury to take into account the warnings given to the public and that, therefore, under prevailing Eleventh Circuit law the claims were preempted.

Petitioner appealed the district court's ruling on FIFRA preemption to the United States Court of Appeals for the Eleventh Circuit, arguing that FIFRA did not preempt any of his claims. Petitioner again urged that his allegation that the active ingredient in Ortho Dursban Lawn & Garden Insect Control was too dangerous to be handled by nonprofessionals or used around residences supports the inference that a do-it-yourself lawn and garden pesticide containing the ingredient is defectively designed rather than mislabeled. The Eleventh Circuit affirmed the district court. The court held that it was bound by the prior panel precedent rule to hold that FIFRA preempted claims premised on failure to warn. As to Petitioner's negligent and defective design claims, the court shifted focus, albeit ever so slightly, from forbidden jury considerations to inescapable causal connections: Because, presumably,

Petitioner would not have used the product had he been given adequate warnings (hypothetically speaking, something along the lines of "this product is too dangerous to use unless you are a trained professional or under the supervision of a trained professional"), the court found that his claims are based at least in part on inadequate labeling, and are therefore preempted by FIFRA. Petitioner subsequently requested a rehearing; it was summarily denied.

Wayne Charles Oken respectfully petitions this Court to review the holding of the Eleventh Circuit.

REASONS FOR GRANTING THE PETITION

On June 28, 2004, this Court granted a petition for writ of certiorari to review the holding of the United States Court of Appeals for the Fifth Circuit in *Bates v. Dow AgroSciences LLC*, 332 F.3d 323 (2003). *See Bates v. Dow AgroSciences LLC*, 124 S. Ct. 2903 (2004). The question presented by petitioners in that petition for writ of certiorari is limited to FIFRA preemption of state law crop injury claims. Petitioner Wayne Oken presents a similar question regarding FIFRA preemption of personal injury claims. There is just as much confusion among the lower courts about which state law personal injury claims, if any, FIFRA preempts. The extent to which individuals can be compensated for injuries caused by pesticides is an issue that is every bit as important as the extent to which farmers may be compensated for crop damage. Moreover, the facts and venue of this case provide this Court with an ideal opportunity to provide direct answers to two particularly nettlesome questions: (1) whether design defect claims predicated on risk-utility tests are preempted because one factor among many is the adequacy of the warnings accompanying the product, and (2) whether design defect

claims predicated on consumer expectations are preempted because the inquiry involves consideration of the warnings.

Finally, the Eleventh Circuit's FIFRA preemption analysis and its holding in this case stand at one end of the FIFRA spectrum. The Eleventh Circuit's "forbidden inquiry" analysis conflicts with this Court's own precedent and provides a stark contrast to the reasoning and analysis of those courts less inclined to find preemption. Petitioner Wayne Oken respectfully requests that this Court grant his Petition for Writ of Certiorari as a companion to *Bates* to identify, to the extent possible, the scope of FIFRA preemption of personal injury claims, and to clarify the proper analysis for questions of FIFRA preemption. In the alternative, Petitioner respectfully requests that this Court grant his petition pending review of the Fifth Circuit judgment in *Bates*, vacate the judgment of the Eleventh Circuit in this case, and remand for further consideration in light of the judgment and opinion of this Court in *Bates*.

I. *Introduction*

The fact that Petitioner's actual, specific allegations of wrongdoing and defect were ignored in favor of purely abstract, formalistic considerations in both published opinions below shows just how important it is that this Court has decided to step into the morass of FIFRA preemption jurisprudence and clarify it. Conjecture is currently the cornerstone of FIFRA preemption analysis in most United States courts of appeals, although there is significant disagreement as to what the proper object of conjecture is. The Eleventh Circuit's "forbidden inquiry" analysis turns on a court's conjecture as to what a jury might be called upon to *consider* in the course of its deliberations. If it is at all possible that a damages claim might require a jury to consider the warnings, the claim is preempted. Under the Eleventh Circuit's FIFRA jurisprudence, states are

forbidden from undertaking such an inquiry. *See Papas v. Upjohn Co.*, 985 F.2d 516, 518 (11th Cir. 1993), *cert. denied sub nom. Papas v. Zoecon Corp.*, 510 U.S. 913 (1993) ("*Papas II*") ("[Plaintiffs'] allegations . . . require the finder of fact to determine whether, under state law, [Defendant] adequately labeled and packaged its product. This inquiry is precisely what section 136v forbids."). In the Eleventh Circuit, whether a state law is preempted by FIFRA section 136v(b) depends not on whether a manufacturer is required to change the label to comply with the state-imposed duty on the manufacturer or restriction on its product, but whether the state *considered* the adequacy of the label required under FIFRA in deciding to impose the additional duty or restriction.

Other circuits have embraced a FIFRA preemption test that turns on the court's conjecture as to how a manufacturer would respond to the imposition of liability predicated on certain allegations. If the manufacturer would probably change the label, then the claim is preempted; if the manufacturer would probably choose to change the product, then the claim is not preempted. *See Worm v. American Cyanamid Co.*, 5 F. 3d 744, 747–48 (4th Cir. 1993) ("*Worm II*") (holding that one key factor to FIFRA preemption analysis is "whether one could reasonably foresee that the manufacturer, in seeking to avoid liability for the error, would choose to alter the product or the label"); *Netland v. Hess & Clark, Inc.*, 284 F.3d 895, 900 (8th Cir. 2002) (citing *Worm II*, 5 F.3d at 747–48, for the same proposition); *Andrus v. AgrEvo USA Co.*, 178 F.3d 395, 399

(5th Cir. 1999).[1] This "manufacturer's choice" test is necessarily a more fact- and allegation-specific test than the Eleventh Circuit's forbidden inquiry test. The manufacturer's choice test requires a court to predict how a manufacturer is likely to respond to liability predicated on the specific allegations. The forbidden inquiry test looks only at the formal elements of the claims and defenses to determine what kinds of facts a jury or other fact finder may have to consider.

Still other courts, including this Court, have carefully considered the interaction between FIFRA subsections 136v(a) and 136v(b) and found that the preemptive provision in 136v(b) is a limitation not on the States' right to make independent determinations about the adequacy of a pesticide's label, but on the duties that states can impose on applicators, manufacturers, formulators, and sellers of pesticides. A state can independently determine that pesticide's label is inadequate, but any effort to limit the harm caused by that inadequacy must be in the form of a regulation or restriction of the use or sale of the pesticide. *See Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 614 (1991) (noting that section 136v(a) "acts to ensure that the States could continue to regulate use and sales even where, such as with regard to the banning of mislabeled products, a narrow pre-emptive overlap might occur"); *Chemical Specialties Mfrs. Ass'n v. Allenby*, 958 F.2d 941, 944 (9th Cir. 1992) (upholding against a FIFRA preemption challenge a positive state enactment requiring point-of-sale or other notices warning consumers of carcinogenicity and observing

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[1] In the opinion that this Court recently granted certiorari to review, the Fifth Circuit transformed this question from whether the manufacturer would change the product (not preempted) or the label (preempted) into whether the manufacturer would change the product or the label (both preempted) or do something else altogether. *See Bates v. Dow AgroSciences LLC*, 332 F.3d 323, 329 n. 9 (5th Cir. 2003).

that "[o]ther than regulating labels, states are left free to impose whatever restrictions they may wish"); *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1541 (D.C. Cir. 1984) (holding that "if a state chooses to restrict pesticide use by requiring that the manufacturer compensate for all injuries or for some of these injuries resulting from the *use* of a federally registered pesticide, federal law stands as no barrier") (emphasis in original). This analysis focuses on the choices that are available to the States under 136v(a). Although it has mostly been used, when it has been used at all, to address questions about whether positive enactments are preempted, nothing requires that limitation of its application.

The Eleventh Circuit's rigid adherence the forbidden inquiry test is not just contrary to the logic of circuits that follow the manufacturer's choice test. It produces different results, sometimes dramatically, in those instances where the adequacy of the label is *relevant* to an asserted claim or defense but is not the basis of the claim. Two of the three most important such instances are squarely presented in this case: (1) consumer expectations tests for design defect, and (2) risk-utility tests for design defect that treat the adequacy of the label as one factor.[2] More importantly, the forbidden inquiry test is plainly contrary to this Court's declaration that the States retain the authority under FIFRA to ban mislabeled products.

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[2] The third instance is where the label's adequacy might be relevant to an available affirmative defense. *See Pitts v. Dow Chemical Co.*, 859 F. Supp. 543 (M.D. Ala. 1994) (holding claims preempted because jury would need to consider label in evaluating affirmative defense of assumption of risk).

II. *This Court Should Grant Review to Resolve the Conflict Among the Lower Courts Regarding Whether FIFRA Preempts Certain Design Defect Claims*

Courts have split over which, if any, design defect claims are preempted by FIFRA. The Eleventh Circuit held in the case before this Court that FIFRA preempts any personal injury claim, including a claim of defective design, in which the warnings would be considered by a fact-finder or in which the warnings can be assigned even a partial causal role in the injury. At the other end of the spectrum, the United States Court of Appeals for the District of Columbia Circuit and the Supreme Court of Montana have both held that FIFRA doesn't preempt any common law damages actions. *See Ferebee*, 736 F.2d 1529; *Sleath v. W. Mont Home Health Servs., Inc.*, 16 P.3d 1042 (Mont. 2000), *cert. denied sub nom. Dow AgroSciences LLC v. Sleath*, 534 U.S. 814 (2001).

A. The Eleventh Circuit's Forbidden Inquiry Test

The Eleventh Circuit was one of the first courts to consider FIFRA preemption after this Court's holding in *Cipollone v. Ligget Group, Inc.*, 505 U.S. 504 (1992), that common law damages actions can qualify as state-imposed "requirements" within the meaning of an express preemption provision. In *Papas v. Upjohn Co.*, 985 F.2d 516, 518 (11th Cir. 1993) ("*Papas II*"), the court concluded that FIFRA preempted claims alleging that a manufacturer "failed to warn users that its product contained certain harmful chemicals and failed to inform users to take appropriate precautionary measures." That conclusion is by itself unremarkable, as most courts that have considered the

question since *Cipollone* have agreed.[3] The court's reasoning, however, is quite remarkable. The court did not base its decision on the assumption that liability premised on such conduct would force the manufacturer to comply with additional or different state-imposed requirements for labeling. Rather, the court found that the "allegations . . . require the finder of fact to determine whether [the manufacturer] adequately labeled and packaged its product." 985 F.2d at 518. The court found that it was this "inquiry" itself – not the imposition of any duties – "that section 136v forbids." *Id.*

Confined to the facts of *Papas II*, the significance of the difference between its forbidden inquiry test and a premise-of-liability test or a manufacturer's choice test is not readily apparent. However, the forbidden inquiry test has subsequently underpinned extraordinarily sweeping interpretations of the reach of FIFRA section 136v(b)'s express preemption clause. In *Pitts v. Dow Chemical Co.*, 859 F. Supp. 543 (M.D. Ala. 1994), the court observed that, "because defendants have raised the affirmative defense of assumption of the risk, the jury will be called upon to weigh the risks posed by Dursban TC against the warnings provided to determine if those warnings are sufficient to apprise users of health risks." 859 F. Supp. at 551. The court relied heavily on the reasoning of *Papas II* in concluding that the claims are preempted by FIFRA section 136v solely because of considerations that may be invoked by an affirmative defense. "For this court to draw a distinction between claims and affirmative defenses, however, would be contrary to the directives of *Papas II* that state common law actions based 'in whole or in part' on inadequate

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[3] *But see Sleath v. W. Mont Home Health Servs., Inc.*, 16 P.3d 1042 (Mont. 2000), *cert. denied sub nom. Dow AgroSciences LLC v. Sleath*, 534 U.S. 814 (2001) (holding that FIFRA does not preempt any common law claims).

labeling are to be preempted and that a jury is to make no inquiry into the adequacy of labeling." *Id.* at 552.

The district court in the case before this Court relied on the forbidden inquiry test in finding that Petitioner's design defect claims were preempted. Under Florida law, a products liability plaintiff can prove a design defect by satisfying either of two tests: (1) a risk-utility test that includes, as one factor among many, the adequacy of warnings, and (2) a consumer expectations-based test. The district court agreed with the defendants that under either test a jury would be required to give consideration to the warnings given to the public in ascertaining the objective expectation of the public regarding the product's dangerousness. In a reflexive application of the forbidden inquiry test, the court therefore held that design defect claims arising under Florida law are preempted, without even considering the specific allegations substantiating Petitioner's design defect claims. *See Oken v. Monsanto Co.*, 218 F. Supp. 2d 1361, 1366–67 (S.D. Fla. 2002).

The court of appeals in the case before this Court introduced a new variation on the forbidden inquiry test: the inescapable causal connection test. "[Petitioner] cannot escape, however, that his injuries were caused, at least in part, by the alleged inadequacy of the label. If the label had adequately warned him of the dangers of Dursban, he contends, he would not have used the product and would

not have been injured."[4] *Oken v. Monsanto Co.*, 371 F.3d 1312, 1314–15 (11th Cir. 2004). The specific factual allegation that the active ingredient of Ortho Dursban Lawn & Garden Insect Control is too dangerous to be handled by nonprofessionals or applied around residences was not set forth in the court's opinion. The court of appeals did not consider whether a manufacturer seeking to avoid liability for selling Ortho Dursban Lawn & Garden Insect Control (a pesticide designed and marketed for use by homeowners) would alter the active ingredient or alter the warnings to include this statement: "Warning: This product contains an ingredient that is too dangerous to be handled by homeowners except under the supervision of a certified applicator." The court of appeals, following Eleventh Circuit precedent, relied instead on the formalistic reasoning underpinning the forbidden inquiry test: If the warnings

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[4] At the risk of undermining the argument for granting this petition, it must be pointed out that the parenthetical clause "he contends" in the quote in the text is accurate only in the most technical sense. The *Dow defendants contended* that, under Florida law, a product cannot be unreasonably dangerous, no matter how dangerous it is, so long as the warnings adequately reflect the danger. Therefore, they argued, any claim proceeding under a strict liability theory is necessarily an attack on the warnings, because sufficiently strong warnings would undercut the claim that it was unreasonably dangerous. Petitioner responded that such an argument was pure sophistry. Sure, given his allegations, if Ortho Dursban Lawn & Garden Insect Control carried a warning stating that it was too dangerous for use by nonprofessionals or around residences, it *might* not be an unreasonably dangerous product. But, *Petitioner contended* – and here's where the technical accuracy creeps in – no one (which excludes Petitioner as well) would buy a do-it-yourself lawn and garden pesticide with such warnings. The point of this should be, not that the court of appeals got the specific allegations wrong, but that the Eleventh Circuit has established (two variations of) a test for FIFRA preemption that proceeds on formalistic reasoning alone, without regard to the specific allegations.

are arguably relevant – even if only because there exists some hypothetical warning that would have simultaneously rendered the product completely unmarketable and prevented this plaintiff's use of the product – the claim is preempted.

B. Consumer Expectations-Based Claims Under the Manufacturer's Choice Test

Petitioner's claim would undoubtedly have survived FIFRA *preemption* under the manufacturer's choice test. Petitioner's allegation is that the active ingredient of Ortho Dursban Lawn & Garden Insect Control is too dangerous for use by nonprofessionals or around residences. There is clearly a reasonable inference that a manufacturer not desiring to commit economic suicide would find an alternative active ingredient for Ortho Dursban Lawn & Garden Insect Control (a pesticide designed and marketed for use by homeowners) that is safe for use by nonprofessionals around residences rather than alter the warnings to advise against use by homeowners except under professional supervision. *See Arnold v. Dow Chemical Co.*, 110 Ca. Rptr. 2d 722, 736–37 (Cal. Ct. App. 2001) (relying on manufacturer's choice test in holding that FIFRA does not preempt plaintiffs design defects claim premised on California's consumer expectations test because "to warn that use would cause serious injury to children and fetuses would effectively end consumer demand for the products").

It is true that the Fourth Circuit, one of the leading proponents of the manufacturer's choice test, held in an unpublished opinion that "the existence of [FIFRA labeling] standards, especially when they relate to the content of product information, bears on reasonable expectations" in affirming the dismissal of a plaintiff's consumer expectations-based design defect claim. *See Lescs v. William R. Hughes, Inc.*, 168 F.3d 482, 1999 WL 12913, *12 (4th Cir. 1999) (mem.), *cert. denied*, 528 U.S. 1119 (2000). While the

acknowledgment of a relationship between FIFRA labeling and reasonable expectations would *mandate* preemption under the forbidden inquiry test, it did not under the Fourth Circuit's analysis. Instead, the Fourth Circuit affirmed the dismissal because, "There is no evidence that Dursban failed to meet consumer expectations." *Id.* It is beyond dispute that the existence of warnings on the label required by the United States Environmental Protection Agency ("EPA") under FIFRA *bears*, in an evidentiary sense, on just about any conceivable claim that involves a product registered under FIFRA, including a claim based on consumer expectations. The question presented in this case, and the question in dire need of resolution from this Court, is whether the fact that the existence of warnings on the EPA-approved label *bears* on those claims necessarily means that section 136v(b) *preempts* those claims.

III. *This Court Should Grant Review to Resolve the Conflict Between the Eleventh Circuit's Forbidden Inquiry Test and This Court's Prior Precedent on FIFRA*

The Eleventh Circuit's forbidden inquiry test swallows FIFRA section 136v(a), which reads: "A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent that it does not permit any sale or use prohibited by this subchapter." 7 U.S.C. 136v(a). If section 136v(b) is read to forbid the States from even *considering* the adequacy of an EPA-approved label in going about their affairs as so-called partners in the regulation of pesticides, then there is precious little regulation of the sale or use of any pesticide that it can engage in. The label contains directions for use (in both the target area sense and the how-to sense), so any efficient state regulatory scheme that sought to limit the use of a pesticide would presumably have not only considered the adequacy of the label, but also found against it.

It is not at all clear why the States would be forbidden from considering the adequacy of the EPA-label in going about their affairs, restricting and regulating uses, banning sales, etc. More to the point, the Eleventh Circuit's holding that the States are forbidden from considering the adequacy of the label is directly in conflict with this Court's holding that FIFRA section 136v(a) "acts to ensure that the States could continue to regulate use and sales even where, such as with regard to the banning of mislabeled products, a narrow preemptive overlap might occur." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. at 614. The forbidden inquiry analysis is all about preemptive overlap, the bigger the better. This Court has also explained that section 136v(a) sets forth the "authority explicitly conferred upon the States that might otherwise have been preempted through actual conflicts with federal law." *Id.* at 607. This Court should grant this petition to resolve the apparent conflict.

IV. *This Court Should, In the Alternative, Grant Review Pending the Resolution of* Bates, *Vacate the Judgment of the Court of Appeals, and Remand for Further Consideration*

The judgment and opinion of the Eleventh Circuit was without the benefit of this Court's analysis of FIFRA preemption pending its review of the Fifth Circuit's judgment in *Bates v. Dow AgroSciences LLC*, 332 F.3d 323 (5th Cir. 2003), *cert. granted Bates v. Dow AgroSciences LLC*, 124 S. Ct. 2903 (2004). This Court's disposition of that case is likely to shed light on, and conflict with, the Eleventh Circuit's opinion in this case. Even in the unlikely event that the disposition of *Bates* turns exclusively on questions of whether and to what extent the EPA does or does not regulate phytotoxicity, i.e., harm to target crops, that in itself would shed light on the proper analysis for personal injury claims. This Court should, at the least, grant this petition pending review of the Fifth Circuit judgment in *Bates*, vacate the judgment of the Eleventh Circuit in this case, and

remand for further consideration in light of the judgment and opinion of this Court in *Bates*.

CONCLUSION

This case raises important questions of federal law. The Eleventh Circuit's FIFRA preemption analysis conflicts with the analysis of other Circuit Courts of Appeal, especially in its treatment of consumer expectations-based design defect claims. The Eleventh Circuit's broad reading of FIFRA section 136v(b) conflicts with this Court's own precedent. This case presents an important question of federal law in its own right and would be an extremely useful personal injury companion case to the crop injury case now pending before this Court.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

Appendix Page

Opinion of
The United States Court of
Appeals for the Eleventh Circuit,
With Attachment,
entered June 4, 2004 1

Attachment:

Appendix
undated 5

Opinion of
The United States Court of
Appeals for the Eleventh Circuit
entered August 2, 2004 9

Final Order of Dismissal of
The Honorable William P. Dimirouleas
entered September 30, 2002 11

Order Granting Defendants' Motions for
Summary Judgment of
The Honorable William P. Dimirouleas
entered September 30, 2002 13

Order Granting Dow Defendants'
Motion for Summary Judgment
Omnibus Order Re Other Motions of
The Honorable William P. Dimirouleas
entered August 26, 2002 16

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-15943

D.C. Docket No. 01-07360 CV-WPD

WAYNE CHARLES OKEN,

Plaintiff-Appellant,

versus

THE MONSANTO COMPANY, THE SOLARIS GROUP, SCOTTS COMPANY, successor in interest to Monsanto Company and the Solaris Group, DOW AGROSCIENCES, LLC, DOW AGROSCIENCES, as successor in interest to DowElanco, DOWELANCO, as successor in interest to Dow Chemical Company, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(June 4, 2004) [Entered June 4, 2004]

Before TJOFLAT and CARNES, Circuit Judges, and CONWAY*, District Judge.

PER CURIAM:

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* Honorable Anne C. Conway, United States District Judge for the Middle District of Florida, sitting by designation.

I.

The Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y ("FIFRA") establishes a comprehensive regulatory scheme for pesticides. Manufacturers of pesticides must obtain Environmental Protection Agency ("EPA") approval of their products and the warning labels accompanying them, which instruct consumers on how to use the product safely. 7 U.S.C. §§ 136a(a), 136a(c)(1)(C). FIFRA contains an express preemption provision: States "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required" by FIFRA. 7 U.S.C. § 136v(b).

In Papas v. Upjohn Co., 985 F.2d 516, 517, 520 (11th Cir. 1993) (Papas II), a damages action for personal injuries sustained "due to exposure to pesticides manufactured by [codefendant] Zoecon," we held that "FIFRA expressly pre-empts state common law actions against manufacturers of EPA-registered pesticides to the extent that such actions are predicated on claims of inadequate labeling or packaging." Such preemption extended to plaintiff's claims based on "negligence, strict liability, and breach of implied warranty," because "[e]ach of these claims was, in whole or in part, a claim of inadequate labeling for alleged dangers arising from exposure to the pesticides." Id. at 517. We therefore affirmed the district court's summary judgment dismissing the plaintiff's claims.

II.

The case before us mirrors Papas II. Wayne Charles Oken purchased two bags of Ortho Dursban Lawn & Garden Insect Control ("Dursban") from Home Depot U.S.A., Inc. ("Home Depot"). The Monsanto Company ("Monsanto") manufactured the Dursban, and Dow Chemical Company ("Dow") manufactured the product's active ingredient. A

warning label approved by EPA, and annexed to this opinion as an Appendix, was attached to the bags Oken purchased.

Oken read the warning label and, using a two-wheeled spreader, spread both bags, one at a time, on his lawn to control ants. As he spread the Dursban, he was exposed[1] to a "mist of powder [that] arose."[2] He soon suffered a reaction, which required extensive hospitalization and treatment.

The day before the statute of limitations would have barred this action, Oken brought this action for money damages against Dow, Monsanto and Home Depot[3] in a Florida circuit court.[4] His complaint sounded in negligence and strict liability. It alleged that Dow and Monsanto were negligent in designing and manufacturing the Dursban and in composing the warning label attached to the bags, Home Depot was negligent in selling an unreasonably dangerous product, and all three defendants were strictly liable for

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[1] The complaint alleges that Oken "using an appropriate spreader, applied the [Dursban] ... to his lawn and garden for its intended use, and was exposed to the Dursban product." Complaint, ¶ 23 (emphasis added). Paragraph 23 is the only paragraph of the complaint that describes Oken's contact with Dursban.

[2] Oken asserted this in his Statement of Facts filed in response to the defendants' motions for summary judgment.

[3] Oken also named numerous parties related to Dow and Monsanto, and "A.B.C. Company," a fictitious entity that was never served and never appeared in this case.

[4] The applicable statute of limitations is provided by Fla. Stat. § 95.11, which states that "[a]n action founded on negligence," and "[a]ny action not specifically provided for in these statutes" shall be commenced within four years of the time the action accrues.

dispensing an unreasonably dangerous product.

The defendants removed the case to federal district court, and in their answers to the complaint, alleged that FIFRA preempted each of Oken's claims. Following some discovery, they moved the district court for summary judgment. The court granted their motion, concluding that the case was indistinguishable from, and controlled by, Papas II.[5] Oken now appeals.

III.

The adequacy of the Dursban warning label is at the heart of this case. Although Oken's complaint sounds in negligence and strict liability, we cannot ignore the critical causation element of each of these torts. For his negligence claims, Oken must show that the defendants' alleged negligence caused his injuries. For his strict liability claims, he must show that the alleged defects in Dursban caused his injuries. Oken cannot escape, however, that his injuries were caused, at least in part, by the alleged inadequacy of the label. If the label had adequately warned him of the dangers of Dursban, he contends, he would not have used the product and would not have been injured. As Papas II instructs, because all of Oken's claims are based at least in part on inadequate labeling, they are all preempted by FIFRA. 985 F.2d at 517.

Oken asks that we overrule Papas II. He argues that the Supreme Court's decision in Medtronic, Inc. v. Lohr, 518 U.S. 470, 16 S.Ct. 2240, 135 L. Ed. 2d 700 (1996), requires that we reevaluate Papas II and find that state-law causes of action based on inadequate warnings are not preempted by FIFRA. However, subsequent to the Supreme Court's decision in

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[5] The court granted the defendants summary judgment on Oken's manufacturing defect claim for lack of evidence. Oken does not challenge the ruling in this appeal.

Medtronic, we reaffirmed Papas II in Lowe's Home Centers, Inc. v. Olin Corp., 313 F.3d 1307, 1308 (11th Cir. 2002). Because a panel of this court is not free to reconsider an issue decided by a prior panel, United States v. Steele, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc), we are bound by our decision in Lowe's, and must adhere to Papas II.

AFFIRMED.

APPENDIX

ORTHO(R)
Dursban(R) Lawn & Garden Insect Control
FLEA AND TICK CONTROL (Outdoors) SOIL INSECTS - European Crane Fly/Leather Jacket (larvae) and White Grubs. HOME INVADING PESTS (Outside) - Ants, Brown Dog Ticks, Cockroaches, Clover Mites, Crickets, Earwigs, Fleas, Millipedes, Sowbugs (Pillbugs), Silverfish, Spiders (including Black Widow Spiders).
HOME LAWNS - Ants, Chinch Bugs, Cutworms, Fall Armyworms, Earwigs, Crickets, Brown Dog Ticks, Fleas, Leafhoppers, Lawn Moths (Sod Webworms), Chiggers, Clover Mites, Grasshoppers, Spittlebugs, Sowbugs (Pillbugs).

DIRECTIONS FOR USE
It is a violation of Federal law to use this product in a manner inconsistent with its labeling.

READ ENTIRE LABEL. USE STRICTLY IN ACCORDANCE WITH LABEL PRECAUTIONARY STATEMENTS AND DIRECTIONS.

FLEA AND TICK CONTROL (OUTDOORS)
Treat once a month beginning when pests first appear in late spring (May - June) and continue until late summer (September - October). Eliminating weeds around the home and mowing lawns frequently reduces hiding places. Dogs,

cats, their kennel or bedding area should also be treated with a registered product such as ORTHO Pet Flea & Tick Spray. In addition, if fleas or ticks are indoors on carpets or pet resting areas, use a product such as FLEA-B-GON(R) Flea & Tick Killer or ORTHO Home Pest Insect Control. Treat all three sites - outdoors, indoors, and the pet with appropriate labeled products to achieve control. If any one of these areas is missed, it can serve as a source of reinfestation.

HOW TO USE: Apply uniformly to home laws using a Drop, Broadcast, or ORTHO WHIRLYBIRD(R) Spreader. Treat when insects or signs of damage first appear. Retreat as necessary if reinfestation occurs.

Keep children and pets off treated areas until this material is washed into turf and grass is dry.

TO CONTROL: Ants, Chinch Bugs, Cutworms, Fall Armyworms, Earwigs, Crickets, Brown Dog Ticks, Fleas, Leafhoppers, Lawn Moths (Sod Webworms), Chiggers, Clover Mites, Grasshoppers, Spittlebugs, Sowbugs (Pillbugs): Apply 2½ lbs per 1,000 sq ft (40' x 25'). Immediately after application, give the lawn a light watering. See table below for suggested spreader settings.

Sod Webworms (Lawn Moths): Sod Webworm caterpillars feed on grass blades at night. Adult Webworms (Lawn Moths) emerge at dusk. They fly over the lawn laying eggs that later hatch into destructive caterpillars. Damage appears first as small brown spots which rapidly develop into large brown areas. If Lawn Moths are noticed in large numbers, or at first sign of damage, treat entire lawn.

TO CONTROL: Mole Crickets, Hyperodes (Turfgrass Weevils) European Crane Fly/Leather Jacket (larvae) and White Grubs (larvae of European Chafer, Southern Chafer and Japanese Beetle): Use 5 lbs/1,000 sq ft (see table below).

Thoroughly water immediately after application to wash the insecticide into the soil. For Mole Crickets apply in May or June when pests are small. Hyperodes (Turfgrass) Weevils: Treat suspected problem areas in mid-April and again in mid-May. White Grubs: Treat when grubs are young and actively feeding near the soil surface, usually during late July and August. Consult your Agricultural Extension Service Specialist for timing of application.

HOME INVADING PESTS: PERIMETER TREATMENT AROUND FOUNDATION (OUTSIDE) Ants, Crickets, Fleas, Sowbugs (Pillbugs), Millipedes, Earwigs, Clover Mites, Silverfish, Spiders (Incl. Black Widow Spiders), Cockroaches, Brown Dog Ticks: Apply in a band 2 to 6 ft wide around the building using an ORTHO WH1RLYBIRD(R) Spreader. Treat garbage can storage areas and outdoor pet resting areas. Do not treat pests with this product.

[Table omitted]

* One level ORTHO WHIRLYBIRD(R) Hand Spreader holds 2 lbs of product. NOTE: One level measuring cup (8 fl oz) hold 5½ oz of granules. Three cups equal approximately 1 lb of product.

[Table omitted]

STORAGE AND DISPOSAL:
STORAGE: Keep pesticide in original container. Do not put into food or drink containers. Avoid contamination of feed and foodstuffs. Store in a cool, dry place, preferably in a locked storage area.
DISPOSAL: PRODUCT - Partially filled bag may be disposed of by securely wrapping original container in several layers of newspaper and discard in trash.
CONTAINER- DO NOT REUSE EMPTY BAG. Discard bag in trash.

PRECAUTIONARY STATEMENTS
HAZARDOUS TO HUMANS & DOMESTIC ANIMALS
CAUTION: Harmful if absorbed through skin. Avoid contact with skin, eyes, or clothing. Wash thoroughly with soap and water after handling.

FIRST AID: In case of skin contact, wash skin with plenty of soap and water. In case of eye contact, wash eyes immediately with plenty of water. See a doctor if irritation persists. Note to Physicians: Emergency information call 1-800-454-2333.

ENVIRONMENTAL HAZARDS: This pesticide is extremely toxic to fish, birds, and other wildlife. Do not apply directly to water. Drift and runoff from treated areas may be hazardous to aquatic organisms in adjacent aquatic sites. Cover or incorporate spills. Do not contaminate water when disposing of equipment washwaters,

NOTICE: Buyer assumes all responsibility for safety and use not in accordance with directions.

Medical Information call 1-800-454-2333
Product Information call 1-800-225-2883

Solaris(TM)

ORTHO(R), WHIRLEYBIRD(R), FLEA-B-GON(R), SOLARIS(TM) Trademarks of Monsanto Company

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-15943 BB

WAYNE CHARLES OKEN,

Plaintiff-Appellant,

versus

THE MONSANTO COMPANY,
THE SOLARIS GROUP,
SCOTTS COMPANY, successor in
interest to Monsanto Company
and the Solaris Group, et al.,

Defendants-Appellees.

[Entered August 2, 2004]

On Appeal from the United States District Court for the
Southern District of Florida

BEFORE: TJOFLAT and CARNES, Circuit Jueges and CONWAY*, District Judge.

PER CURIAM:

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* Honorable Anne C. Conway, United States District Judge for the Middle District of Florida, sitting by designation.

The petition(s) for rehearing filed by appellant, Wayne C. Oken, is DENIED.

ENTERED FOR THE COURT:

/S/
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-7360-CIV-DIMITROULEAS

WAYNE CHARLES OKEN,

Magistrate Judge Seltzer

Plaintiff,

vs.

THE MONSANTO COMPANY, THE SOLARIS GROUP, SCOTTS COMPANY; DOW AGROSCIENCES LLC, HOME DEPOT U.S.A., INC., et al,

Defendants.

[Entered September 30, 2002]

FINAL ORDER OF DISMISSAL

THIS CAUSE is before the Court *sua sponte*.

On August 26, 2002, this Court granted summary judgment in favor of the Dow Defendants, which include Dow Agrosciences LLC (a/k/a Dow Elanco), Dow Elanco (n/k/a Dow Agrosciences LLC), The Dow Chemical Company, Epco, Inc. and Rofan Services, Inc. Subsequently, on September 23, 2002, the Court granted summary judgment in favor of Defendants Home Depot, The Scott's Company and The Monsanto Company.

At this time, the only listed defendants left are the Solaris Group, a division of the Agricultural Group of the

Monsanto Company, that was never separately served with a copy of the Summons and Complaint, and the A.B.C. Company, an unknown defendant who has never been named. Due to the Court's grant of summary judgment as to all named and served defendants, this Court can provide no further relief in this case and the case is dismissed.

Accordingly, it is **ORDERED AND ADJUDGED** that the above-styled case is **DISMISSED.** All pending motions are denied as moot, and the Clerk shall close this case.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 30 day of September, 2002.

/S/
WILLIAM P. DIMIROULEAS
United States District Judge

Copies furnished to:
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Dean Barnhard, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-7360-CIV-DIMITROULEAS

WAYNE CHARLES OKEN,

Magistrate Judge Seltzer

Plaintiff,

vs.

THE MONSANTO COMPANY, THE SOLARIS GROUP, SCOTTS COMPANY; DOW AGROSCIENCES LLC, HOME DEPOT U.S.A., INC., et al.,

Defendants.

[Entered September 30, 2002]

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court upon Defendant Home Depot's Motion for Summary Judgment Joining in Part Dow Agroscience's Motion for Summary Judgment [DE 124], Plaintiff's Opposition [DE 139], Defendant Home Depot's Reply [DE 140], Defendant Scott's Company's Joinder in the Dow Defendants' Motion for Summary Judgment [DE 135], and Defendant Monsanto Company's Notice of Joinder in the Dow Defendants' Motion for Summary Judgment [DE 137]. The Court has carefully considered the motions and is otherwise fully advised in the premises.

Defendants Home Depot Scott's Company and Monsanto have joined in the Dow Defendants' Motion for Summary Judgment, which this Court granted on August 26,2002. Defendants Scott's Company and

Monsanto stand in the same legal position as the Dow Defendants as manufacturers of a product that Plaintiff alleges caused him injuries. These Defendants, like the Dow Defendants, allege that Plaintiff's claims are preempted by the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136. This Court agrees with Defendants in that Plaintiff's claims, regardless of the particular label, amount to claims that Defendants failed to properly warn Plaintiff about the dangers of the product or label the product in a way that would have prevented such harm to Plaintiff.

Plaintiff's claims against Home Depot are preempted by FIFRA for the same reasons that the claims against the Dow Defendants, Scott's Company and Monsanto are preempted, even though Home Depot is a retailer as opposed to a manufacturer of the product. Plaintiff argues that he has not had sufficient discovery at this point to know whether Home Depot knew or should have known of the dangerousness of the product sold to Plaintiff and whether Home Depot was therefore negligent in failing to warn Plaintiff about such dangers. However, like Plaintiff's claims as to the other Defendants, Plaintiff's claim of negligence against Home Depot is preempted by FIFRA because Plaintiff is essentially claiming that the label on the product was insufficient and Home Depot should have made up for this insufficiency with additional warnings.

Therefore, the Court grants Summary Judgment to Defendants Home Depot, Scott's Company and Monsanto Company, referring to the law and analysis presented in its August 26, 2002 Order Granting Dow Defendants' Motion for Summary Judgment [DE 128].

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant Home Depot's Motion for Summary Judgment Joining in Part Dow Agroscience's Motion for Summary Judgment [DE 124] is hereby **GRANTED** as to all claims against that Defendant;
2. Defendant Scott's Company's Joinder in the Dow Defendants' Motion for Summary Judgment [DE 135] is hereby **GRANTED** as to all claims against that Defendant;
3. Defendant Monsanto Company's Notice of Joinder in the Dow Defendants' Motion for Summary Judgment [DE 137] js hereby **GRANTED** as to all claims against that Defendant;

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 23 day of September, 2002.

/S/
WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-7360-CIV-DIMITROULEAS

WAYNE CHARLES OKEN,

Magistrate Judge Seltzer

Plaintiff,

vs.

THE MONSANTO COMPANY, THE SOLAIUS GROUP, SCOTTS COMPANY; DOW AGROSC1ENCES LLC, HOME DEPOT U.S.A., INC., et al.,

Defendants.

[Entered August 26, 2002]

ORDER GRANTING DOW DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OMNIBUS ORDER RE OTHER MOTIONS

THIS CAUSE is before the Court upon the Dow Defendants' Motion for Summary Judgment [DE 65], Plaintiff's Motion for Extension of Time to Disclose Experts [DE 32], Dow Defendants' Cross Motion to Bar Plaintiff's Use of Undisclosed Expert Testimony [DE 35-2], Plaintiff's Motion for New Scheduling Order [DE 42], Dow Defendants' Cross Motion for Extension of Time of Expert Discovery Deadline [DE 55-2], and Dow Defendants' Motions to Strike Affidavits [DE 93 and 96]. The Court has carefully considered the motions and is otherwise fully advised in the premises.

In his complaint, Plaintiff brings claims under Florida law for negligence and strict liability against the Dow Defendants[1] and the Monsanto Defendants[2] for their formulation and manufacture of Ortho Dursban Lawn & Garden Insect Control, which contains the chemical Chloropyrifos.[3] Plaintiff alleges that he used the product for his garden as intended, but that it caused him severe neurological, physical and psychological injury. Complaint, ¶23. Specifically, Plaintiff alleges negligence and strict liability in the formulation (¶¶ 27a, 31a, 43, 49), manufacture (¶¶27b, 31b, 43,49),[4] and failure to warn of dangerous characteristics of Dursban (¶¶27g, 31g, 43, 49), among other allegations in those claims that relate to cither of these three possible categories of design defect, manufacturing defect, and failure to warn. See Jennings v. BIC Corporation, 181 F.3d 1250, 1255 (11th Cir. 1999) citing Ferayorni v. Hyundai Motor Co.. 711 So.2d 1167, 1170 (Fla. 4th D.C.A. 1998)(in turn citing

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[1] These Defendants include Dow Agrosciences LLC (f/k/a Dow Elanco), Dow Elanco (n/k/a Dow Agrosciences LLC), The Dow Chemical Company, Epco, Inc. and Rofan Services, Inc.).

[2] These Defendants include Monsanto Company, the Solaris Group, and Scotts Company.

[3] Similar claims are brought against an unidentified distributor of the product, as well as against the seller of the product, Home Depot, Inc.

[4] The Court had previously denied Defendants' Motion to Dismiss the negligent testing claims in ¶ 27c and ¶31c, though it held that Florida law does not recognize an independent claim of negligent testing, and such claims are subsumed under the negligent manufacturing claims.

West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976).[5]

Among other motions, the Dow Defendants filed a motion for summary judgment seeking dismissal of all claims based upon preemption by the Federal Insecticide Fungicide and Rodenticide Act ("FIFRA"), Plaintiff opposes the motion. Several other motions relate to expert discovery and submission of affidavits in opposition to the motion for summary judgment. The Court will address the issues in turn.

II. DISCUSSION

A. Summary Judgment Standard

The Court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on-file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 323(1986). The Court should not grant summary judgment unless it is clear that a trial is unnecessary. Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 255 (1986), and any doubts in this regard should be resolved against the moving party, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157(1970).

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[5] The Court does note that Plaintiffs complaint is somewhat of a shotgun pleading, in that it does not separate out into separate claims the different theories of product liability recognized by Florida law. This lack of separation makes separate analysis of each type of claim somewhat difficult.

The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp., 477 U.S. at 323. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case. Id. at 325.

After the movant has met its burden under Rule 56(c), the burden of production shifts and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electronic Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). According to the plain language of Fed.R.Civ.P. 56(e), the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings," but instead must come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); Matsushita, 475 U.S. at 587.

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. Anderson, 477 U.S. at 257. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party." Walker v. Darby. 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the non-moving party "is merely colorable, or is not significantly probative, then summary judgment may be granted." Anderson, 477 U.S. 242, 249-50.

B. FIFRA Preemption

The Dow Defendants motion seeks summary judgment on the grounds of preemption of Plaintiff's state

law claims pursuant to FIFRA. The United States Supreme Court held in 1991 that FIFRA does not preempt the entire field of pesticide regulation, but allows state regulation of sale or use apart from labeling or packaging requirements, and "leaves ample room for States and localities to supplement federal efforts," such as an affirmative permit scheme for the actual use of pesticides. Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 612-13, 111 S.Ct. 2476, 2485-86 (1991) (holding that FIFRA did not preempt a local ordinance regulating the use of aerial spraying in applying pesticides). The Court analyzed the preemption language in FIFRA to reach this conclusion. Specifically, 7 U.S.C. § 136v (entitled "Authority of States") states that: (a) "A State may regulate the sale or use of any federal registered pesticide or device in the State, but only if and to the extent the regulation does permit any sale or use prohibited by this subchapter" and (b) "Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter."

Defendants argue that the term "requirements" includes state law actions for damages, while Plaintiff argues that it does not preclude such actions. While the Supreme Court has never answered this question in the FIFRA context, the Court has concluded in the cigarette labeling context that "requirements" may not be based upon "smoking and health . . . under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 515, 112 S.Ct. 2608, 2617 (1992). Following remand based upon Cipollone, the Eleventh Circuit held that state common law claims for negligence and strict liability that require a showing that labeling or packaging caused an injury are preempted by FIFRA because the term "requirements" in 7 U.S.C. § 136v(b) includes state common law claims. Papas v. Upjohn

Company, 985 F.2d 516, 520(11th Cir. 1993), *cert. denied*, 114 S.Ct. 300. However, claims that do not challenge the labeling and packaging are not preempted. Id. The plaintiff in Papas had conceded that each of their claims alleges in part that defendant had failed to warn users of the harmful chemicals and to take precautionary measures. Plaintiff in this case argues that he has made no such concession, and that claims that the pesticide is unreasonably dangerous regardless of labeling are not preempted.

Plaintiff principally relies upon the 1996 United States Supreme Court case of Medtronic v. Lohr, in which a 5-4 decision (with the fifth vote provided in a concurring opinion by Justice Breyer) concluded that in the Medical Device Act ("MDA"), the term "requirements" in the preemption section did not preclude all state common law damages actions. 518 U.S. 470, 489, 116 S.Ct. 2240, 2252 (1996). The majority held that because the word "requirement" in the MDA was used often in that statute it had more specific meaning than when used in the Cigarette Labeling Act. Both the plurality and the concurring opinion concluded that due to a Food & Drug Administration regulatory scheme defining preemption as involving "specific" requirements as to a device, the state personal injury action could proceed. Medtronic. 518 U.S. at 494-500, 505-507, 116 S.Ct. 2254-58, 2260-61.[6]

Plaintiff argues that if the Eleventh Circuit analyzed FIFRA preemption today, it would follow the Supreme Court's analysis in Medtronic, retreat from Papas, and

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[6] The four justice plurality opinion also concluded that Congress could not have intended to preempt all state tort claims in the absence of a federal remedy under the MDA, without explicitly stating such preemption. Medtronic, 518 U.S. at 487,116 S.Ct. at 2251. Even in Cipollone, not all state law claims were ruled preempted.

conclude that Plaintiff's failure to warn claims are not preempted.

While Plaintiff may be correct, and the issue is a close one, this Court is bound to follow the Eleventh Circuit law as it remains today.[7] The Medtronic opinion is now six years old, the Papas opinion is now nine years old, yet Papas has not been retreated from nor overruled. The Court notes that several other courts that have considered the issue have found for Defendants. In particular, the California Supreme Court, albeit in a four to three decision, addressed the exact same arguments made by Plaintiff. In its decision, it reviewed case law from many federal circuit courts regarding FIFRA preemption. See Etcheverry v. Tri-Aa Service. Inc., 993 P.2d 306, 373-74 (Cal. 2000). The California Supreme Court concluded that the MDA is distinguishable from the Cigarette Labeling Act and FIFRA because the MDA "gave the FDA a unique role in determining the scope of preemption under the MDA." Id. at 373. The California Court also addressed the argument, supported by an amicus brief by the United States, that the Environmental Protection Agency has specifically disavowed regulated issues of pesticide efficacy, and "concerns itself only with whether a pesticide would have unreasonably adverse effects on human health or the natural environment," but not "whether it will control the target pest or harm the crop it was intended to protect." Id. at 374. The plaintiffs in Etcheverry were suing for crop damage, and not personal injury. Thus, even under the United States' view as presented to the California Supreme Court, personal injury claims for failure

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[7] Just as the Eighth Circuit was bound to follow its precedent regarding FIFRA preemption in Netland v. Hess and Clark, 284 F.3d 895, 899 (8th Cir. 2002), *cert, filed* August 9, 2002.

to warn would be preempted.[8]

Though Papas preempts failure to warn claims, or any claim based upon labeling or packaging requirement, Papas does not hold that all state law claims are preempted. State tort claims that do not involve labeling or packaging are not preempted. 985 F.2d at 520. Plaintiff may bring claims for strict liability and negligence for design defect or manufacturing defect for manufacture of a product that is unreasonably dangerous, provided that the issue of warning to consumers is not implicated. Plaintiff may not bring an inadequate warning or failure to warn claim under a strict liability or negligence theory. National Bank of Commerce v. Dow, 165 F.3d 602, 608 (8th Cir. 1999).

C. Design Refect Claims

1. Strict Liability

Defendants argue that the issue of warning is implicated in Plaintiffs remaining theories of liability, providing an additional reason for preemption because Florida state law looks to consumer expectations or a risk-benefit test to analyze strict liability claims. See Jennings, 181 F.3d at 1255. Defendants argue that any Florida jury considering strict liability under either test would necessarily need to determine, under an objective test, whether the label or package warnings were reasonable to an ordinary consumer. Id. Though there is no direct Florida state law case discussing FIFRA or similar preemption as to this kind of product liability theory, Defendants do cite to several other jurisdictions, including other federal trial courts, that have agreed with Defendants. See Pages 18-27 of Dow Defendants' Brief in Support of Motion for Summary Judgment [DE 67]. This Court agrees. The Eleventh Circuit in

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[8] The California Supreme Court rejected the United States' view and concluded that even claims for crop damage based upon a failure to warn theory were preempted.

Jennings states that Florida law requires a jury to consider "the perspective of an 'ordinary consumer' or the 'normal public expectation'" of the danger. 181 F.3d at 1255. The objective expectation of the public regarding the dangerousness of a product necessarily involves consideration of the warning given to the public. Therefore, such design defect claims that Plaintiff brings under Florida law as to Dursban, a product regulated under FIFRA by the federal government, are preempted. But see Jeffers v. Wal-Mart, 171 F.Supp.2d 617, 622-25 (S.D.W.Va. 2001); In re Starlink, 2002 WL 1559667, *4 (N.D.Ill. July 11, 2002).

2. Negligence

With regard to a negligence claim for any design defect, Plaintiff argues that separate from any failure to warn issues, that Defendants could be liable for designing and manufacturing an unreasonably dangerous product, and, because FIFRA does not preempt Florida state law from banning a product outright, Defendants may be liable for tort damage claims. Since FIFRA precludes Plaintiff from bringing a case seeking changes to labeling, the only claim left for Plaintiff to make is that because Florida could ban Dursban outright, a common law claim based upon defective design of an unreasonably dangerous product is not preempted. Such claim, however, suggests that a manufacture would have to not produce Dursban at all to avoid liability (or at least not sell it in Florida), since extra warnings to people such as Plaintiff with chemical sensitivity are not allowed under state law. The Eleventh Circuit statement that "Decisions of the Florida courts demonstrate that a maker or seller of a product need not go to extreme lengths to protect foreseeable users of its products" precludes just such a claim. 181 F.3d at 1257.

D. Manufacturing Defect Claims

Florida law recognizes a strict liability action for a manufacturing defect, in addition to a negligence cause of action. See McCorvey v. Baxter Healthcare Corp., 2002 WL 1669832 (11 th Cir. July 24, 2002); Warren v. K-Mart Corp., 765 So.2d 235, 237 (Fla. 1st DCA 2000) (quoting Restatement (Third) of Torts that "a product contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product.") Such claims are not preempted by FIFRA. Nat'l Bank of Commerce, 165 F.3d at 609; Worm v. American Cvnamid Co., 5 F.3d 744, 749 (4th Cir. 1993). Defendants argue that the evidence they have submitted regarding quality control in the Dursban manufacturing process irrefutably rebuts any claim of negligence or strict liability by Plaintiff. See Declaration of Michael Meath, Exhibit B to Dow Defendants' Motion for Summary Judgment [DE 65], This Court agrees. There is no evidence that the Dow product has departed from its intended design.[9]

Though Plaintiff argues in response that he has not had an opportunity to discover facts to support more than an inference of the manufacturing defect claims, Plaintiff has had over nine months to discover such facts. Other than the above one-sentence argument in the conclusion section of his opposition to the Dow Defendants' motion for summary judgment, Plaintiff has not provided sufficient reasons to met the standard of Rule 56(f) of the Federal Rules of Civil Procedure to obtain a continuance of the summary judgment motion. See Nat'l Bank of Commerce, 165 F.3d at 606; Worms, 5 F.3d at 749. Therefore, the Court will grant Defendants' Motion for Summary Judgment in its entirety, on grounds of preemption as to claims for failure to warn and design defect, and as a matter of law that no genuine issue of material fact exists as a manufacturing defect.

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[9] See below for discussion of Affidavit of Mohamed Bahie Abou-Donia.

E. Motions to Strike

The Court denies Defendants' motion to strike the affidavit of Dr. Mohamed Bahie Abou-Donia, on the grounds that given FIFRA preemption and Florida law as described above, even if everything Dr. Abou-Donia says is true, and the Court must assume so for purposes of a motion for summary judgment, Defendants' motion for summary judgment must be granted. Though Dr. Abou-Donia's affidavit attempts to state that there is a design defect in the Dursban product,[10] there is no duty in Florida to stop selling or manufacturing a product that might be dangerous to a small segment of the population, in the context of a federal regulatory scheme allowing such sale or manufacture and in which the federal scheme forbids states from expanding warning labels approved by the federal government. See above discussion and Jennings v. Bic Corporation, *supra.* Thus, without deciding issues of Daubert admissibility as to Dr. Abou-Donia affidavit, the Court denies the motion to strike his affidavit as moot.

Defendants also moved to strike Plaintiffs affidavit, medical record, answer to interrogatory number 13, and the affidavit of Richard Hosford. Again, the Court concludes that all of this evidences, even if true, does not affect the Court's conclusions made as a matter of law. The motion to strike is therefore denied as moot.

III. CONCLUSION

The motions concerning scheduling and disclosure of experts are decided below. Basically, the Court grants on a *nunc pro tunc* basis Plaintiffs motion for extension of time to

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[10] See ¶ 14, Affidavit of Mohamed Bahie Abou-Donia, Plaintiffs Notice of Filing, DE 79.

disclose experts. The discovery ruling Plaintiff was waiting for was issued March 25, 2002. The Court has not stricken any experts put forth by Plaintiff. As to Plaintiff's motion for a new scheduling order, the Court will deny this motion. There has been plenty of lime for discovery, even taking into account the discovery motion practice that has occurred.

As to the remaining defendants, the Court notes that Home Depot's Motion for Summary Judgment was just recently filed. As far as the Court can tell from the docket, Defendants Monsanto, Solaris and Scotts have not filed or joined a motion for summary judgment, though the deadline has not yet occurred. Any future such motion should indicate whether those defendants stand in the same position, factually and legally, as the Dow Defendants.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Dow Defendants' Motion for Summary Judgment [DE 65] is hereby **GRANTED** as to all claims against those Defendants;
2. Plaintiff's Motion for Extension of Time to Disclose Experts [DE 32] is hereby **GRANTED**, *nunc pro tunc* to 30 days after the Scotts Company's response to Judge Johnson's March 25, 2002 Order compelling in part certain discovery;
3. Dow Defendants' Cross Motion to Bar Plaintiff's Use of Undisclosed Expert Testimony [DE 35-2] is hereby **DENIED as moot;**
4. Plaintiff's Motion for Scheduling Conference [DE 42-1] and for New Scheduling Order [DE 42-2] is hereby **DENIED;**
5. Dow Defendants' Cross Motion for Extension of Time of Expert Discovery Deadline [DE 55-2] is hereby **DENIED as moot;**
6. Dow Defendants' Motions to Strike [DE 93 and 96] are hereby **DENIED as moot.**

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 26 day of August, 2002.

/S/
WILLIAM P. DIMITROULEAS
United States District Judge

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